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War Stories, Lawyer-to-Lawyer Consultations, and Listservs: Great Tools or Ethical Traps?

Discussing current cases, exchanging war stories, or recounting past experiences on a listserv can have ethical ramifications.

By Michael H. Rubin and Timothy G. Byrd

Technological advances have allowed lawyers to increase their online presence and engagement through social media and other means of online communication. Recently, there has been an increase in legal listservs allowing lawyers to communicate directly with each other, whether based on practice area, geographic location, or bar membership.

A listserv is a closed-end email list. Members send emails to the entire group, and readers can respond. There are many legal listservs. Among those maintained by the ABA are the ABA Center for Public Interest Law and the ABA Section of Legal Education. National, state, and local listservs include the Association of Professional Responsibility Lawyers, the American Bankruptcy Institute, the Pennsylvania Bar Association, and the Houston Trial Lawyers Association [login required].

A lawyer's participation in listservs can be an invaluable resource for gaining insight about and knowledge into new subject matters; however, caution should be exercised because discussing current cases, exchanging war stories, or recounting past experiences on a listserv can have ethical ramifications that risk violating the duty of confidentiality that lawyers have to their clients.

Confidentiality Duties

ABA Model Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Model Rule 1.18(b) extends this duty of confidentiality to information obtained from prospective clients, even when no subsequent representation ensues. Further, Model Rule 1.6(c) requires that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of"

confidential information, and ABA Formal Opinion 480 cautions lawyers who blog "or engage in other public commentary" not to reveal confidential information.

Lawyers who use listservs must be careful to balance the desire to share their wisdom with colleagues or ask about unique legal issues with the black-letter restrictions of their ethical duties of confidentiality. An Alaska Bar opinion confronted the issue of lawyers exchanging "shop talk" or war stories about cases without first obtaining client consent and explained that even omitting the client's name and other privileged information could still result in a violation of Rule 1.6. Nonetheless, the Alaska Bar opinion was hesitant to ban "shop talk" or war stories among attorneys under a literal application of Rule 1.6 and instead found that the rule should be read to prohibit those needless revelations of client information that incur some risk of harm to the client.

ABA Model Rule 1.9 extends the same duties of confidentiality to former clients. Rule 1.9(c) includes an exception to the duty of confidentiality in the event that the information about the former client is "generally known." This phrase has been construed narrowly, as shown by ABA Formal Opinion 479, which cautions that information is not "generally known" and therefore not subject to the confidentiality exception "simply because it has been discussed in open court or is available in court records, in libraries, or in other public repositories of information."

Ethical Participation in Listservs

The common adage of "write every email and text as if it will be read aloud in court" serves as good advice in participating in listserv conversations. A lawyer discussing legal issues or past experiences on a listserv should not include any information that could be used to identify the client or the specific case. Even if the confidential information is in a public filing or in the local media, the lawyer has a duty to maintain confidentiality under the rules.

A prudent approach to protecting the identity of the client is to frame the discussions on the legal issues with hypothetical scenarios rather than describing current cases or recounting past experiences. Comment 4 to Rule 1.6 endorses this approach and provides that a "lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved." While a hypothetical may reduce the risk of disclosing confidential information, when communicating on listservs, it is still important to follow the overarching advice in the comments to Rule 1.6 to be competent and exercise reasonable care. Care should be taken to avoid even hypotheticals if the fact scenario or legal issue can easily be traced back to a current or former client.

And because every state may not read the rules regarding confidentiality as leniently as Alaska in the example above, before engaging in any shoptalk on a listserv, lawyers should know and adhere to the rules and ethics opinions regarding confidentiality in each jurisdiction that governs their conduct.

Finally, because listservs live on the internet, it should be assumed that anything written there will remain in the digital world forever. Hypothetical facts that seem innocuous when written may reveal confidential information when viewed years later. This makes it doubly important to tread cautiously when communicating on a listserv to prevent the accidental disclosure of confidential information.

Michael H. Rubin is a member at McGlinchey Stafford in Baton Rouge, Louisiana. Timothy G. Byrd is an associate with the firm in New Orleans, Louisiana.